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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERTA L.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D061783

(San Diego County
Super. Ct. No. SJ12478A-B)

PROCEEDINGS in mandate after referral to a Welfare and Institutions Code
Section 366.26 hearing. Garry G. Haehnle, Judge. Petition denied.

Roberta L. seeks review of a juvenile court order setting a hearing under Welfare
and Institutions Code section 366.26.¹ She contends the court erred when it found that

¹ Further statutory references are to the Welfare and Institutions Code.

there was no substantial probability that her children would be returned to her care by the 18-month review hearing and terminated reunification services at the 12-month review hearing. We deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Roberta L. and Javier L.² are the parents of H.L. and F.L., now ages 10 and eight years respectively. In December 2010 the San Diego County Health and Human Services Agency (Agency) initiated dependency proceedings after Roberta was arrested by federal authorities and incarcerated on charges of possession and distribution of methamphetamine. Javier had been arrested at the United States-Mexico border with methamphetamine and was in federal custody. The parents remained incarcerated throughout the children's dependency proceedings.

In February 2011, at the jurisdictional and dispositional hearing, the juvenile court found that the children were described by section 300, subdivision (b), removed the children from parental custody and placed them with a maternal aunt, and ordered a plan of family reunification services. Roberta's case plan required her to participate in a parenting education class and substance abuse services, including a 12-step program.

Roberta participated in services while incarcerated. She completed a parenting class and joined a prison program that allowed her to send videotapes of her reading a book to her children. The children's aunt facilitated visitation between the children and their mother twice a month. The children missed their parents and enjoyed visiting them.

² Javier did not file a petition for writ of mandate and this court dismissed his case. We mention Javier in this opinion only when relevant to Roberta's claims of error.

In reports prepared for the 12-month status review hearing, scheduled for February 2012, the Agency reported that Roberta remained incarcerated and her sentencing hearing had been postponed because her attorney was trying to negotiate a lower sentence. The next hearing in Roberta's criminal case was in May 2012. She was hoping to be released in 2013.

Roberta told the social worker she sent a letter to the children every week and called them almost every day to see how they were doing. She encouraged them to do well in school and help their aunt, and told the children she was proud of them. Roberta attended weekly AA groups without fail and provided attendance sheets to the Agency. There were no other programs that were currently available to her in custody.

The children were doing well in their aunt's care. There were no concerns about their health and well-being. The children showed artwork Roberta had made for them to the social worker. The aunt was willing to take guardianship of the children.

The Agency recognized that Roberta participated in the programs available to her and appeared to have the best interests of her children in mind. However, because the parents' circumstances did not permit them to take custody of the children by the 18-month review date and they were unable to participate in reunification services, the Agency recommended the court terminate family reunification efforts and set a section 366.26 hearing.

A contested 12-month status review hearing was held April 12, 2012, approximately 16 months after the children were detained in protective custody. The court admitted the Agency's reports in evidence. The court also admitted into evidence

Roberta's documentation showing that she completed another parenting seminar and regularly attended AA meetings. Roberta did not cross-examine the social worker. No other party offered any affirmative evidence.

Roberta asked the court to place the children, who would remain with their aunt until she was released from prison, in her constructive custody. Roberta asserted she made substantial progress in her case plan, maintained regular visitation and demonstrated a parental role with the children. She argued she might be released by the 18-month review date in June 2012.

The court found the parents were deeply involved with the transportation and sale of large quantities of methamphetamine for a substantial period of time, and acted with complete disregard for their children's safety and well-being. There was no evidence to show Roberta understood that distributing methamphetamine was dangerous to her children. The court denied Roberta's request for constructive placement of the children. The court found that she was provided reasonable family reunification services and made progress with some aspects of her case plan. However, Roberta did not demonstrate she would be able to provide a safe environment to the children. The court further found that Roberta's earliest release date was 2013, which was a significant time beyond the 18-month review date. The court terminated family reunification services and set a section 366.26 hearing.

Roberta petitions for review of the court's order under California Rules of Court, rule 8.452. She requests this court reverse the order setting a section 366.26 hearing.

This court issued an order to show cause, the Agency responded, and the parties waived oral argument.

DISCUSSION

A

Roberta contends the court abused its discretion when it set a section 366.26 hearing. She contends there is no credible evidence to support the finding she would not be released until 2013 and there was no substantial probability of returning the children to her care by the 18-month review hearing. She argues the 2013 release date was based on her comment to the social worker, which was speculation on her part. Roberta also asserts she complied with the requirements of her case plan, consistently contacted and visited her children, and engaged in all services that were available to her while she was in custody.

B

Unless specified exceptions apply, when a child is removed from parental custody the juvenile court must order child welfare services for the child and the parent to facilitate family reunification. (§ 361.5, subs. (a), (b).) For a child who was three years of age or older on the date of the initial removal from parental custody, court-ordered family reunification services are provided beginning with the dispositional hearing and ending 12 months after the date the child entered foster care. (§ 361.5, subd. (a)(1)(A).)

At the 12-month permanency review hearing, the court is required to order the return of the child to the physical custody of his or her parent unless it finds, by a preponderance of the evidence, the return of the child to his or her parent would create a

substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker has the burden of establishing that detriment. The court also determines whether reasonable services have been provided or offered to the parent. (§ 366.21, subd. (f).)

The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs is prima facie evidence that return would be detrimental. In making its determination, the court reviews and considers the social worker's report and recommendations, and must consider the efforts or progress, or both, demonstrated by the parent and the extent to which the parent availed herself of services, taking into account any barriers to an incarcerated parent's access to those court-mandated services and ability to maintain contact with his or her child. (§ 366.21, subd. (f).)

At the 12-month review hearing, if the child is not returned to parental custody, the juvenile court has the discretion to continue the case to the 18-month review date, set a section 366.26 hearing, or order a permanent plan of long-term foster care for the child. (§ 366.21, subds. (g)(1), (2) & (3).) "[C]ourt-ordered services may be extended up to a maximum time period not to exceed 18 months" after the child was originally removed from the physical custody of his or her parent if the juvenile court finds that there is a substantial probability the child will be returned to the physical custody of his or her parent and safely maintained in the home within the extended period of time, or that reasonable services have not been provided to the parent. (§§ 361.5, subd. (a)(3), 366.21, subd. (g)(1).)

To find a substantial probability that the child will be returned to parental custody and safely maintained in the home, the juvenile court is required to find all of the following:

"(A) That the parent or legal guardian has consistently and regularly contacted and visited with the child.

"(B) That the parent or legal guardian has made significant progress in resolving problems that led to the child's removal from the home.

"(C) The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs." (§ 366.21, subd. (g)(1).)

The reviewing court must affirm an order setting a section 366.26 hearing if it is supported by substantial evidence. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1020.) "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874; *Elijah R. v. Superior Court* (1998) 66 Cal.App.4th 965, 969.) We do not reweigh the evidence, evaluate the credibility of witnesses or resolve evidentiary conflicts. The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

C

The court found that Roberta would not be able to complete the objectives of her treatment plan and provide for the children's safety, protection and emotional well-being by the 18-month review hearing. On review, Roberta has not shown the evidence is insufficient to support the court's findings. (§ 366.21, subd. (g)(1).) The court could reasonably infer Roberta was aware of the length of her impending sentence and give credence to her statement that the earliest she would be released was in 2013. Her statement that she "hoped" to be released in 2013 indicates she was facing a longer sentence. Further, Roberta was aware of the evidence contained in the Agency's reports. She did not object to their admission in evidence, seek to cross-examine the social worker or present affirmative evidence about the status of her plea negotiations in criminal court. The court could reasonably conclude there was not a substantial probability the children would be returned to Roberta's physical custody and safely maintained in the home by the time of the 18-month review hearing.

In addition, there is substantial evidence in the record to support the court's finding Roberta did not demonstrate that she understood the risk of harm her involvement in selling and distributing methamphetamine presented to the children's safety and well-being. Over several months, Drug Administration Enforcement (DEA) agents observed Roberta and Javier storing methamphetamine at their home and transferring it to other individuals. On two occasions, DEA agents saw Roberta give methamphetamine to a person outside her home while the children were at home, placing the children at risk for injury or death with respect to violent behaviors associated with drug trafficking and

distribution. The social worker said Roberta's behavior demonstrated a significant lack of concern for their children's safety, and lack of education and awareness about the risks to them, including injury or death from the violence and retaliation associated with methamphetamine and drug distribution. Roberta had not yet completed her rehabilitation through the criminal process. The record does not indicate that she had gained an understanding about the dangers of exposing her children to drug trafficking. The court could reasonably infer that Roberta's previous activities indicated that until she demonstrated an understanding about the risks she created in the home environment, she would not be able to provide for the safety, protection, physical and emotional well-being of her children. The court did not abuse its discretion when it terminated reunification services and set a section 366.26 hearing.

DISPOSITION

The petition is denied.

BENKE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.